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15-388

Chief, Contract Branch

19 March 1951

Assistant General Counsel

Retainer Fees (Ref: PO/PCD-1014)

1. Reference is made to your memorandum of 6 March 1951 in connection with the request received by your office to prepare a contract with an engineering firm providing for payment of a flat retainer fee per month, regardless of the extent of utilization of services. Further, you state there may be a period when no services would be rendered.

2. Although the ASPR's are silent with respect to this type of agreement, general contract law and, particularly, normal relationships between professional men and their clients offer ample and express evidence of the validity and function of such agreements.

3. A retaining fee, in the ordinary sense of the term, is a fee which is given to a professional man on being consulted in order to insure his future services. The distinction between retainers and specific fees is that upon making an engagement for services (retainer) the professional man is to be paid reasonable compensation for being so bound.

4. The legal concept of mutuality of consideration is present in these arrangements and creates an enforceable contract, it having been held that there may even be a consideration without the accrual of any benefit at all to the other party.

5. The question posed by your memorandum is not a general retainer in the usual sense of the word, for it is known at the outset that consultations will be made as a matter of course by the engineering firm, though relating the stream of consultations to a time or unit basis appears to be undeterminable. This situation appears to be more positive than the usual general retainer.

6. There are many variations of retainer arrangements. The arrangement suggested by the final sentence of paragraph 1 of your memorandum would indicate some knowledge of the traffic to be expected and the contemplated cost thereof. This appears to be the basis of the retainer. No legal objection is perceived to the proposed contract providing for payment on the basis described.

7. In passing, this office would like to draw your attention to the general objections to contracting with firms or third parties for personal services. The objections stem from the fact that such contracts delegate to contractors the right to select persons to render service for the Government. Applicable laws and regulations require that appointment of officers or employees are to be made by heads of agencies or their duly authorized subordinates. This objection may be overcome by a clear demonstration that a product or service is being procured from an organization and that it is impossible or impracticable to have the work performed by government personnel.

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8. From the government's standpoint a contract of this type is somewhat unusual and suggests a continuous appraisal of services rendered by the firm in order to assure receipt of dollar value.

9. If you wish to discuss or pursue this matter any further, this office will be pleased to offer its assistance or advice in connection with some of the prevailing practices.

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cc: Subject
Chrono

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